United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To Be Argued By
GARY P. NAFTALIS

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Pages

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1698

UNITED STATES OF AMERICA,

Appellee,

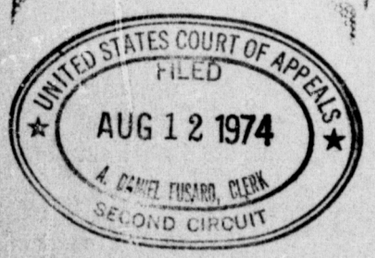
- against -

WILSON TORRES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT



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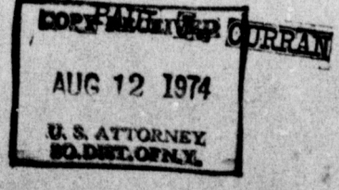

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UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR APPELLANT

POINT I

TORRES' SINGLE ACT OF PROMISING TO DELIVER HEROIN WHICH WAS NEVER DELIVERED WAS INSUFFICIENT TO IMPLICATE HIM IN THE BROADER CONSPIRACY CHARGED IN THE INDICTMENT.

The conspiracy charge in the instant case encompassed two transactions - (1) a sale of heroin on January 18, 1972, and (2) negotiations for a sale of heroin on February 14, 1972, which never took place.

There was no evidence that Torres participated in or had any knowledge of the January 18, 1972 sale. The sole evidence against Torres was that on February 14, 1972, he

told the undercover agent that he would deliver the heroin to him. These conversations occurred after agent Guzman had negotiated with defendants other than Torres to purchase the narcotics (Tr. 67-8). In our main brief, we cited authorities in this Circuit holding that such a single act would be plainly insufficient to link Torres to the broader conspiracy charged in the indictment absent proof that Torres had knowledge of the broader conspiracy (Appellant's brief, pp. 10-11). And the Government specifically conceded in the trial Court that Torres did not have such knowledge (Tr. RMSF-10 of Minutes of March 25, 1974).

In attempting to respond to this argument, the Government's brief merely establishes that there was sufficient evidence from which the jury could find that Torres conspired to sell narcotics on February 14, 1972 (Government's brief, pp. 6-7). This was not the charge in the indictment. Rather, the indictment upon which Wilson Torres was convicted charged a broader conspiracy which also included the narcotics sale of January 18, 1972. Thus, the Government was required to prove that Torres was aware of the broader conspiracy, e.g., the January 18, 1972 sale. No matter how expansively the

Government characterizes the evidence*, such proof is totally lacking in the record. Indeed, the District Judge specifically asked the prosecutor, "Do you claim that Torres knew anything about the earlier transaction?". To which the prosecutor responded, "There is no proof of that, Your Honor" (Transcript of March 25, 1974, RMSF-10). Having chosen to charge Torres with being part of a broader conspiracy and obtaining the benefits of introducing into evidence the bag of heroin sold on January 18, 1972, the Government was required to prove its charge. It did not, and the indictment must be dismissed. See United States v. DeNoia, 451 F.2d 979, 981 (2d Cir. 1971).**

*The Government appears to take solace from the evidence that Torres told Officer Guzman three times on the evening of February 14, 1972, that he would deliver the heroin. This repetition does not make Torres' single act of promising to deliver heroin three acts. Moreover, the Government's claim that Torres was present when any of the negotiations for the heroin purchase took place is flatly contrary to the record. Indeed, Agent Guzman specifically conceded that on that night, Torres participated in no negotiations, nor was "within hearing distance" of any of these negotiations (Tr. 67-8; 72-3).

**In attempting to distinguish DeNoia, the Government inaccurately described the proof against the defendants Jacovino and Scorzello (Government's brief, p.7, F.N.). In that case, the Court specifically pointed out that Jacovino and Scorzello had "proven knowledge of the common origin of the drugs in the two transactions." (451 F.2d at 981). In the instant case, it is undisputed that Torres didn't even know about the other narcotics transaction.

POINT II

REVERSIBLE ERROR WAS COMMITTED BY THE GOVERNMENT'S IMPROPER ATTEMPTS TO "IMPEACH" ITS OWN WITNESS ORTIZ AND THE IMPROPER USE OF ORTIZ' TESTIMONY IN THE PROSECUTOR'S SUMMATION.

In our main brief, we pointed out that the Government's impeachment of its own witness Ortiz and the use of Ortiz' testimony in the prosecutor's summation exceeded permissible bounds and deprived Torres of a fair trial (Appellant's brief, pp. 12-18). These errors included calling Robert Hemley, Esq., one of the Assistant United States Attorneys involved in the prosecution as a witness despite the repeated admonitions of this Court against placing the credibility of an Assistant United States Attorney into issue. E.g., United States v. Alu, 246 F.2d 29, 33, 34 (2d Cir. 1957); United States v. Pepe, 247 F.2d 838 (2d Cir. 1957); United States v. Mullings, 364 F.2d 173, 175 N.1 (2d Cir. 1966). The Government attempts to escape the effect of this salutary rule by lamely arguing that "Hemley played no part in the proceedings except to sit at the Government's counsel table" (Government's brief, p.10). The mere fact that Assistant United States Attorney Hemley played a more passive role in front of the jury than did Assistant United States Attorney Cutner, in no way altered Hemley's role as an Assistant United States Attorney connected with this very prosecution. See

United States v. Alu, supra. This fact was patently plain to the jury that heard his testimony United States v. Zane, 495 F.2d 683, 694 (2d Cir. 1974), the sole authority relied upon by the Government, is completely inapposite. In Zane, an SEC lawyer, not an Assistant United States Attorney was called to testify. Nowhere in Zane does the Court sanction the practice of placing an Assistant United States Attorney on the witness stand. Suffice it to say Hemley was not an SEC attorney, FBI agent, IRS agent or postal inspector; he was a Federal prosecutor.

Moreover, the Government's strategy of putting both Ortiz and Hemley on the stand was pre-conceived and intentional and not due to inadvertence or negligence. Chief Government counsel informed the Court that the Government intended to call Ortiz as a witness only if Assistant United States Attorney Hemley would be permitted to testify to impeach Ortiz. When defense counsel strenuously objected, Judge Wyatt ruled that the Assistant United States Attorney could testify and indicated that it was up to the Government to determine whether they wished to take the risk of infecting the record with error. To which the Assistant United States Attorney replied:

> "I take it we will go forward and the Government will assume the risk." (Tr. 157-160).

Nor was Assistant United States Attorney Hemley the only

person who could have so testified. At the time of the alleged conversation between Torres and Ortiz in the courtroom, other people who included court clerks, court reporters, interpreters, and marshalls* were present. The Government never made any factual showing to the District Court that none of these people were available to testify (Tr. 157-160). See United States v. Alu, supra, 246 F.2d at 33-34. Indeed, the Government conspicuously chooses to ignore this point in its brief.

While the Government's brief characterizes Hemley's testimony as "very limited", the use made of it in the prosecutor's summation was devestatingly prejudicial. The prosecutor argued that Hemley's testimony showed that Ortiz was lying to protect Torres and didn't want to tell the jury that "his friend Wilson Torres was the guy who sold heroin" (Tr. 232-3). Since there was no evidence that Torres ever sold narcotics, this argument filled a gap in the Government's case.**

The Government attempts to justify the prosecutor's argument by making the extraordinary claim that one who conspires to sell narcotics and doesn't sell any "is a seller of narcotics" (Government's brief, p. 11). This argument finds no support in logic or the law. No legal authority is cited in the Government's brief for the remarkable proposition that one

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*Both Torres and Ortiz were in custody at the time of trial.

**Subsequently, in his summation, the prosecutor again told the jury that they could find that Torres was "selling narcotics" (Tr. 234).

who agrees to sell narcotics is a seller of narcotics even though he didn't sell any. The Government also makes the inconsistent claim that the jury could not have been misled by the prosecutor's misstatement because it was clear that there was no proof that Torres sold narcotics (Government's brief, p. 12). This argument proves too much for it would excuse any prejudicial misstatement by a prosecutor if it were clearly contrary to the evidence. For what the prosecutor was bluntly telling the jury was that had Ortiz been truthful, he would have filled the missing gaps in the Government's case and established that Torres was a narcotics seller. Moreover, this argument permitted the jury to conclude that Torres was suborning Ortiz' perjury. See United States v. Block, 88 F.2d 618 (2d Cir.), cert. denied, 301 U.S. 690 (1937) (discussed at pp. 17-18 of Appellant's brief). Thus, this error was gravely prejudicial and in no way can be characterized as harmless.*

*The Government's claim that there was no objection to the prosecutor's summation remarks is not supported by the record. Defense counsel specifically objected to these very remarks of the prosecutor as "violently unfair" (Tr. 233). In addition, after the summation, defense counsel moved for a mistrial based on the prosecutor "misstatements of the record" in summation and specified the prosecutor's "attempt to have the jury draw the opposite conclusions from what Mr. Ortiz testified to...." (Tr. 269-70).

POINT III

THE JURY WAS MISLED REGARDING THE TESTIMONY OF THE GOVERNMENT'S PRINCIPAL WITNESS GUZMAN AT A PRIOR TRIAL AND GOVERNMENT COUNSEL VOUCHED FOR GUZMAN'S CREDIBILITY.

The Government's principal witness at trial was undercover police officer Guzman. Unless the jury believed Guzman's testimony, it was obliged to find Wilson Torres not guilty. On cross-examination, it was established that certain inculpatory conversations that Guzman now claimed he had with Torres were not in his report of investigation and that Guzman had also not mentioned one of them at a prior trial of co-defendant Jesus Sanjurjo (Tr. 57-8; 74-7; 81-3). In order to blunt the effect of these facts, the prosecutor asked Guzman the following questions:

"Q. Detective, who was the defendant on trial in that case to which Mr. Naftalis has directed your attention?

A. Jesus Sanjurjo.

Q. Were you asked during that trial for an account of your conversation with Wilson Torres on the evening of February 14, 1972?

A. No, I was not.

Q. In this trial you mentioned on several occasions you had several conversations with Jesus Sanjurjo?

A. Yes, sir.

Q. Have you recounted those conversations in detail during this trial?

A. No, sir." (Tr. 83).

The prosecutor's redirect examination misled the jury in two respects. First, the jury was given inaccurate testimony that Guzman had other conversations with Jesus Sanjurjo which were not recounted at the Torres trial. Second, the jury was misled into believing that in the Jesus Sanjurjo trial, agent Guzman had not testified about his conversations with Wilson Torres on the evening of February 14, 1972, thus providing an excuse for the omissions in his prior testimony.*

In responding to the first claim (the jury being inaccurately informed regarding the existence of other conversations with Jesus Sanjurjo), the Government does not claim that the answers elicited by the prosecutor were accurate. Rather, the Government concedes "arguendo" that the answers elicited by the prosecutor were "misleading" (Government's brief, pp. 14-15 FN.), but argues that the defense could have corrected this misimpression on recross. Appellant's claim that the scope of recross was improperly restricted by the Court's refusal to admit the transcript of the Jesus Sanjurjo trial is fully discussed in Appellant's brief and need not be reiterated herein. Moreover, it should be emphasized that it is not the defendant's obligation to correct misleading testimony which was elicited by the prosecution from its own witness in an effort to blunt the effect of cross-exam-

*This claim is discussed in great detail at pages 19-25 of Appellant's brief. It will not be reiterated except as necessary to respond to the Government's arguments.

ination. The Government is obligated to present truthful testimony and to correct its witness' testimony if not accurate. See Giglio v. United States, 405 U.S. 150, 153 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103, 112 (1935). This inaccurate testimony not only was not corrected but was utilized by the prosecutor in summation to explain away inconsistencies between Guzman's testimony at the Sanjurjo trial and in the instant case (Tr. 231).

Regarding the second area of misleading testimony elicited by the prosecutor (the omitted conversation in the Jesus Sanjurjo trial), the Government asserts that the trial Court properly exercised its discretion in curtailing recross-examination. This argument misses the point. Defense counsel was not simply reiterating or expanding on what he had done before. Rather, defense counsel was vainly attempting to clarify the inaccurate state of the record which was caused by the prosecutor's redirect examination. This was of the highest necessity in a case which rose or fell on Guzman's credibility.

The Government further asserts that the prior transcript would not have completely contradicted Guzman's testimony for it would have shown Torres present but not speaking during part of this conversation. We disagree with this claim and respectfully ask the Court to compare the transcript of the

two trials, particularly pp. Gab. 11 of the Jesus Sanjurjo transcript and pp. 57-9 of the Torres transcript. In any event, if the transcript is susceptible to differing interpretations, the jury should have been permitted to have the prior transcript to make their own judgment as to Guzman's veracity. Moreover, as even the Government counsel concedes "arguendo", the prior transcript would have established the inaccuracy of Guzman's testimony about the existence of other conversations with Jesus Sanjurjo. It, therefore, should have been received in evidence.

Finally, in our main brief, we asserted that Guzman's credibility was also improperly bolstered when the prosecutor stated his personal belief in Guzman's truthfulness (Tr. 230). (See discussion in Appellant's brief, pp. 23-4, and cases cited therein.) The Government responds that "no objection was taken" to this remark (Government's brief, p. 14). This is not entirely accurate. While no immediate objection was made to this improper argument, defense counsel made a specific mistrial motion based on that statement after summation:

> "Mr. Naftalis:
>
> * * *
>
> Secondly, I want to move for a mistrial based upon a statement Mr. Cutner made in his closing statement, which my notes reflect as follows, and whatever the trans-

cript reflects is obviously accurate, these are just my hasty notes: 'I submit to you that Mr. Guzman or Agent Guzman's testimony was totally or wholly credible'. If that's what was said by Mr. Cutner, I would think that constitutes vouching by the prosecutor to the credibility--" (Tr. 270).

This mistrial motion was made in ample time for Judge Wyatt to recall the jury and instruct them regarding this improper argument. However, since Judge Wyatt ruled (incorrectly we contend) that the argument was proper (Tr. 270-1), an immediate objection would not have resulted in having the jury instructed to disregard the prosecutor's remarks. Thus, the mistrial motion adequately preserved this error for appellate review. See United States v. Briggs, 457 F.2d 908, 911-12 (2d Cir.), cert. denied,409 U.S. 986 (1972); United States v. Grunberger, 431 F.2d 1062, 1068-69 (2d Cir. 1970).

CONCLUSION

For all of the foregoing reasons, the judgment of conviction must be reversed.

Dated: New York, New York
August 12, 1974.

Respectfully submitted,

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